

**IN THE EUROPEAN COURT OF HUMAN RIGHTS
IN THE MATTER OF:**

TIMURTAS

v.

**TURKEY
(Application No. 23531/94)**

**WRITTEN COMMENTS OF
THE CENTER FOR JUSTICE AND INTERNATIONAL LAW**

I. Introduction

The Center for Justice and International Law ("CEJIL")¹ appreciates the opportunity to submit its written comments on this case by permission of the President of the First Chamber of the European Court of Human Rights (the "Court") on June 10, 1999, pursuant to Rule 61 §§3-5 of the Rules of Court.

Since 1991, CEJIL's principle objective has been to achieve the full implementation of international human rights law in the member states of the Organization of American States. A central component of CEJIL's work is the defense of victims of human rights abuses, including victims of forced disappearances, before the Inter-American Commission of Human Rights (the "Inter-American Commission") and the Inter-American Court of Human Rights (the "Inter-American Court").

In the spirit of dialogue and cooperation between our regional systems, CEJIL welcomes this occasion to offer an analysis of inter-American jurisprudence. These comments will examine the methods of proving violations of the right to life and the right to personal integrity in cases of forced disappearances. It is hoped that the Court will consider the wealth of inter-American jurisprudence in the treatment of the crime of forced disappearances in examining this case.

¹The Executive Director of CEJIL, Viviana Krstiević, was assisted in the preparation of these written comments by *pro bono* attorneys for CEJIL, Monica Smith and Tea Gorjanc. For further information on CEJIL, see Appendix A.

II. Disappearances in Latin America

Forced disappearances² have been called the perfect crime as they are intended to ensure absolute impunity for state actors involved in a heinous act. The perpetrators are unknown and the victim has vanished; without bodies of the victims, witnesses or identifiable guilty parties, there are no traces of a crime.³ Over time, as numerous incidents of forced disappearances have been reported in countries ruled by dictatorships as well as by democratically elected governments, the defining characteristics of the crime become apparent. In the most common scenario, the victim is a political activist or a criminal suspect who is taken by state agents, or with state complicity, to a secret location. No facts are divulged to the families of the victim or anyone outside the state apparatus. The *incommunicado* detention effectively prohibits the victim's access to judicial remedies and due process protections. Usually, the victim is subjected to torture and other cruel and inhuman treatment, eventually leading to death and the disposal of the body. From start to finish, every effort is made by the perpetrators to erase all trace of the victim and of the crime itself. It would appear as though the person had simply vanished. A wall of denial is erected to surround the circumstances of the disappearance, effectively insuring impunity.

Although not a new phenomenon in the realm of human rights violations, it was in Latin America during the 1960's and 1970's that incidents of forced disappearances became common. This situation corresponded with the rise of repressive governments in various parts of the hemisphere. The Inter-American Commission, alerted by numerous complaints during the 1970's, became increasingly concerned about forced disappearances and the subsequent development of a systematic practice.⁴ In response, the Inter-American Commission relied on its broad powers to protest, deter, and in many cases prevent disappearances. Its efforts were both creative and flexible, having to walk a fine line between serving its quasi-judicial and political roles.⁵

²The word "disappearances" is derived from the Spanish term *desaparecidos* (disappeared persons), which has been widely used in Latin America for several decades.

³Ana Lucrecia Molina Theissen, "La Desaparición Forzada de Personas en América Latina," ESTUDIOS BÁSICOS DE DERECHOS HUMANOS VII, San José, IIDH, 1996, at 65.

⁴Systematic violations were carried out with exceptional intensity in, among other countries, Argentina, Guatemala and Chile.

⁵For instance, the Inter-American Commission requested information, encouraged mediation and utilization of its complaint system. It issued direct appeals and conducted on-site missions to the countries where forced disappearances were occurring, urging acknowledgment of the detention and release of the victims. It also issued reports on the human rights situation in several countries that were important for defining and publicizing the practice as well as establishing evidence of state responsibility. See generally, Cecelia Medina Quiroga, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM*, Martinus Nijhoff Publishers, 1988, at Section 6.5.

In the mid-1980's, the Inter-American Commission submitted several cases to the Inter-American Court dealing with the practice of forced disappearances, namely, *Velásquez Rodríguez*, *Godínez Cruz*, and *Fairén Garbi and Solís Corrales*.⁶ This led to the issuance of ground-breaking decisions condemning the practice. In the 1990's, the Inter-American Court continued to develop its jurisprudence on the subject of forced disappearances and illegal detentions both in isolated incidents and in systematic patterns of practice,⁷ in cases such as *Castillo Páez*,⁸ *Neira Alegría*,⁹ *Suárez Rosero*,¹⁰ *Blake*,¹¹ *Caballero Delgado and Santana*,¹² *Castillo Petrucci*,¹³ *Paniagua Morales*,¹⁴ *Loayza Tamayo*,¹⁵ and *Aloboetoe*.¹⁶

⁶*Velásquez Rodríguez Case*, Inter-Am. Ct.H.R., Judgment of July 29, 1988, Series C, No. 4 (hereinafter, "*Velásquez Rodríguez*"); *Godínez Cruz Case*, Inter-Am. Ct.H.R., Judgment of Jan. 20, 1989, Series C, No. 5 (hereinafter, "*Godínez Cruz*"); and *Fairén Garbi and Solís Corrales Case*, Inter-Am. Ct.H.R., Judgment of Mar. 15, 1989, Series C, No. 6 (hereinafter, "*Fairén Garbi and Solís Corrales*"). These cases were collectively known as the "Honduran Disappearance Cases."

⁷In this text, the term "isolated incident" means a case of forced disappearance in which no pattern of practice is used to prove state responsibility. It may nonetheless refer to cases that occur in countries where an officially tolerated practice exists. The term "pattern" or "pattern of practice" refers to a state sponsored or tolerated plan to carry out forced disappearances which have been shown in a court of law to consist of specific steps that are often systematically repeated.

⁸*Castillo Páez Case*, Inter-Am. Ct.H.R., Judgment of Nov. 3, 1997, Series C, No. 34 (hereinafter, "*Castillo Páez*").

⁹*Neira Alegría et. al. Case*, Inter-Am. Ct.H.R., Judgment of Jan. 19, 1995, Series C, No. 20 (hereinafter, "*Neira Alegría*").

¹⁰*Suárez Rosero Case*, Inter-Am. Ct.H.R., Judgment of Nov. 12, 1997 (hereinafter, "*Suárez Rosero*").

¹¹*Blake Case*, Inter-Am. Ct.H.R., Judgment of Jan. 24, 1998 (hereinafter, "*Blake*").

¹²*Caballero Delgado and Santana Case*, Inter-Am. Ct.H.R., Judgment of Dec. 8, 1995 (hereinafter, "*Caballero Delgado and Santana*").

¹³*Castillo Petrucci Case*, Inter-Am. Ct.H.R., Judgment of May 30, 1999, Series C (hereinafter, "*Castillo Petrucci*").

¹⁴*Paniagua Morales et. al. Case*, Inter-Am. Ct.H.R., Judgment of Mar. 8, 1998, Series C, No. 37 (hereinafter, "*Paniagua Morales*").

¹⁵*Loayza Tamayo Case*, Inter-Am. Ct.H.R., Judgment of Sept. 17, 1997, Series C, No. 33 (hereinafter, "*Loayza Tamayo*").

¹⁶*Aloaboetoe Case*, Inter-Am. Ct.H.R., Judgment of Dec. 4, 1991, Series C, No. 11.

According to various governmental reports, the number of victims of forced disappearances in Latin America reaches into the tens of thousands.¹⁷ The history of these events has affected an even greater number of people, as victims' families continue to suffer because of the absence of information about the fate of their missing family members. Unfortunately, according to reports of the Inter-American Commission, the Inter-American Court and the United Nations Working Group on Enforced and Involuntary Disappearances,¹⁸ incidents of forced disappearances continue to be reported in the Americas and in many countries around the world.¹⁹

¹⁷It has been estimated by human rights groups that over 90,000 people have been forcibly disappeared in Latin America; numbers provided by state-sponsored investigations predictably show more conservative estimates. In Argentina, in the years from 1975 to 1980 (at the height of repression), a total of 8,961 persons were forcibly disappeared, according to the statistics in the Annex to the National Commission on the Disappearance of Persons report, *NUNCA MÁS*, 1984. In Guatemala, there were 6,159 persons who were forcibly disappeared from the time of the internal uprisings in 1962 through 1996, according to *GUATEMALA: MEMORIA DEL SILENCIO: CONCLUSIONES Y RECOMENDACIONES DEL INFORME DE LA COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO*, 1999. In Chile, the victims numbered 957 for the years of 1973 to 1990, as stated in the *REPORT OF THE NATIONAL COMMISSION ON TRUTH AND RECONCILIATION*, Vol. 2, Talleres La Nación, 1991. In Honduras, for the years of 1980 to 1993, it was disclosed that 179 persons were forcibly disappeared at the hands of the armed forces, according to the study of Leo Valladeres Lanza, *THE FACTS SPEAK FOR THEMSELVES: THE PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS*, Human Rights Watch & CEJIL translation, 1994. Statistics were compiled for the period of 1980 to 1997 in the *REPORT OF THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES*, E/CN.4/1998/43 of Jan. 12, 1998, Annex II: Cases of Enforced or Involuntary Disappearances Reported to the Working Group Between 1980 and 1997, for, among others, the following countries: Argentina (3,453 reported cases of involuntary disappearances); Colombia (1,006 cases); El Salvador (2,661 cases); Mexico (343 cases); Nicaragua (234 cases) and Peru (3,004 cases).

¹⁸This was accomplished by Resolution 20 (XXXVI) on February 29, 1980.

¹⁹According to the *REPORT OF THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES*, E/CN.4/1998/43 of Jan. 12, 1998, forced disappearances have occurred in recent years in the following Latin American countries: Argentina, Bolivia, Brazil, Colombia, Chile, El Salvador, Guatemala, Haiti, Honduras, Mexico, Paraguay, Peru and Uruguay. At present, incidents of forced disappearances occur frequently in Colombia and Mexico. Worldwide, incidents and systematic practices have been documented in countries from Afghanistan to Zaire. *Id.*

Increased awareness of the pervasive nature of forced disappearances led to an international legislative effort at both regional and global levels. This resulted in the establishment of the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, the United Nations Declaration on the Protection of all Persons from Enforced Disappearances; numerous resolutions of the General Assembly of the Organization of American States from 1979 onwards, urging investigation and an end to the practice of forced disappearances; and the Inter-American Convention on Forced Disappearance of Persons, adopted in 1994.

III. Elements of the Crime of Forced Disappearances

The use of international law has strengthened the common understanding of this crime and has provided tools to deter further occurrences. This included the development of several definitions of forced disappearances describing the crime's essential elements. For instance, the Inter-American Convention on Forced Disappearance of Persons uses the following definition:

"... forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."²⁰

²⁰Article II, Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará, 9 June 1994, 24th regular session of the General Assembly of the OAS.

This definition, substantially similar that of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances,²¹ identifies the following elements of crime:

- deprivation of freedom,
- state agent responsibility,
- absence of information regarding the victim,
- the victim remains outside the protection of the law.

Taken together, these elements contribute to a finding of multiple violations of the victim's rights, particularly the right to personal liberty and security, the right to protection from cruel and inhuman treatment, and, in the vast majority of cases, the right to life.²² In fact, the Inter-American Court considers the crime of forced

²¹The definition in the third paragraph of the United Nations Declaration on the Protection of all Persons from Enforced Disappearance reads: "... enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." (U.N. General Assembly Resolution 47/133 of Dec. 18, 1992 (hereinafter, "U.N. Res. 47/133").)

²²Such was the finding the landmark cases *Velásquez Rodríguez* and *Godínez Cruz*, where the Inter-American Court found that forced disappearances cause the following violations (among others) of the Inter-American Convention: a violation of

disappearances to constitute a multiple and continuing violation for as long as the whereabouts or fate of the victim remain unknown.²³ As the Inter-American Commission stated early on, "a 'disappearance' not only constitutes an arbitrary deprivation of freedom but also a serious danger to the personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process."²⁴ This characterization of human rights violations encompassed by the crime of forced disappearances also corresponds with Article I of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances.²⁵

the right to personal liberty and security, which includes in Article 7 the right to protection from arbitrary arrest or imprisonment, the right of detainees to be brought promptly before a judge and their entitlement to trial within a reasonable time; a violation to the right to humane treatment, which encompasses through Article 5 the prohibition against torture and cruel or inhuman treatment or degrading punishment, and the right to respect for the inherent dignity as a human being; and a violation of the right to life, under Article 4. *Velásquez Rodríguez*, at paras. 155-57; *Godínez Cruz*, at paras. 163-65. (The American Convention on Human Rights was signed at the Inter-American Specialized Conference on Human Rights, at San José, Costa Rica, on November 22, 1969, and is also known as the Pact of San José.)

²³*Blake Case*, Inter-Am. Ct.H.R., Judgment of July 2, 1996, Preliminary Exceptions, at para. 39; see also, *Velásquez Rodríguez*, at para. 155; *Godínez Cruz*, at para. 163. This principle is included as well in Article III of the Inter-American Convention on Forced Disappearances of Persons.

²⁴TEN YEARS OF ACTIVITIES, 1971-1981, Inter-American Commission on Human Rights, General Secretariat, OAS, 1982 (hereinafter, "TEN YEARS OF ACTIVITIES"), at 319. See also, *Fairén Garbi and Solís Corrales*, at para. 151: "[the] practice [of disappearances] is a radical departure from the Pact of San José because it implies the crass abandonment of the values that emanate from human dignity and of the fundamental principles on which the inter-American system and the Convention are based."

²⁵Article I states: "Any act of enforced disappearance is an offense to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to

torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life." Declaration on the Protection of all Persons from Enforced Disappearances, U.N. Res. 47/133.

IV. Evaluation of the Evidence

The defining characteristic of the crime of forced disappearances is the persistent denial of information regarding the victim by government authorities who have placed the victim outside the protection of the law and who control - or often destroy - the evidence. This technique adds to the difficulty of proving responsibility at the individual and state levels, facilitating impunity.

While cases of forced disappearances, like any other case, are governed by principles of evidence of the inter-American system, the Inter-American Court considers the specific nature and elements of the crime while applying the principles to a particular set of facts. Since the lack of information regarding the victim is a central element of forced disappearances, the evidentiary issues of the burden and standard of proof are of critical importance in establishing responsibility. The Inter-American Court therefore analyzes (a) the burden of proof of each party, (b) the standard of proof necessary to draw legal conclusions, and (c) the nature of permissible proof in determining whether the facts of the case support a finding for the alleged violations.

A. Burden of proof

According to the principles of evidence in the inter-American system, the petitioners must prove the alleged human rights violations.²⁶ However, there are certain circumstances which allow this burden to shift onto the respondent state. Three are discussed here with respect to cases of forced disappearances: the existence of a pattern of practice, state control of the evidence, and the silence of the state.

The first instance in which the burden of proof can shift is through the establishment of a pattern of disappearances. Accordingly, once the Inter-American Commission succeeds in proving an officially tolerated or orchestrated pattern of practice, and that the facts of an individual case fit the pattern, the state must then prove that the individual was not a victim of such a practice.²⁷

Another instance in which the burden might shift to the state is in cases in which it has been concluded that the state has control over the evidence. The Inter-American Court has discussed the burden on the state as follows:

²⁶*Velásquez Rodríguez*, at para. 123.

²⁷*Id.*, at para. 126. "If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this."

"[it] is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisons and then the investigations were under the exclusive control of the Government, *the burden of proof therefore corresponds to the defendant State*. This evidence was or should have been at the disposal of the Government had it acted with the diligence it required."²⁸

The Inter-American Court has repeatedly noted that:

"In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. The State controls the means to verify acts occurring within its territory."²⁹

Therefore, once it is established that the state controls or should control the evidence, the burden will be on the state to show that it was not involved in the alleged forced disappearance.

In a third example of burden-shifting in forced disappearance cases, the Inter-American Court has considered the silence or ambiguity of the state to have certain evidentiary value. The Inter-American Court has stated, "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgement of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law."³⁰ As a result, failure by the state to present sufficient probative evidence creates a presumption in favor of the petitioner.³¹

B. Standard of proof

²⁸*Neira Alegria*, at para. 65 (italics added).

²⁹*Paniagua Morales*, at para. 71, *Velásquez Rodríguez*, at paras. 134-138 and *Godínez Cruz*, at paras. 140-144.

³⁰*Velásquez Rodríguez*, at paras. 134-138; *Godínez Cruz*, at paras. 140-144; see also, *Paniagua Morales*, at para. 71.

³¹*Suárez Rosero*, at para. 33 *in fine*; *Neira Alegria*, at para. 44. Any such evidence presented by the state must be of enough weight to shift the burden back to the petitioners; for instance, in *Castillo Páez*, the Inter-American Court found insufficient the state's simple denial regarding Mr. Castillo-Páez's arrest, along with their presentation of altered police logs which failed to mention him as a detainee. *Castillo Páez*, at paras. 58-59.

The standard of proof in cases of forced disappearances, as applied on several occasions by the Inter-American Court, is one "which considers the seriousness of the charge and which ... is capable of establishing the truth of the allegations in a *convincing manner*."³² Again, this contrasts with domestic criminal law, which has a higher standard of proof.³³ In this way, especially with regard to forced disappearance cases in which the evidence is by definition scarce, the Inter-American Court adopts international jurisprudence recognizing the power of courts to freely weigh evidence, avoiding a rigid rule regarding the amount of proof necessary to support a judgment.³⁴

C. Admissibility of evidence

The Inter-American Court has a liberal rule governing the admissibility of evidence and has shown flexibility in its evidentiary review. It has found circumstantial or presumptive evidence to be "especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnaping or the whereabouts and fate of the victim."³⁵ The use of indirect and circumstantial evidence is essential in cases of forced disappearances, since the little direct evidence that may exist is in the control of the accused state. The Inter-American Court takes into account both direct and indirect evidence, "in accordance with the rules of logic and on the basis of experience."³⁶

³²*Velásquez Rodríguez*, at para. 129; *Godínez Cruz*, at para. 135; *Fairen Garbi and Solís Corrales*, at para. 132; *Gangaram Panday*, at para. 49 (italics added).

³³*Paniagua Morales*, at para. 71, *Velásquez Rodríguez*, at paras. 134-138 and *Godínez Cruz*, at paras. 140-144: "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

³⁴*Paniagua Morales*, at para. 70.

³⁵*Velásquez Rodríguez*, at para. 131. See also, *Godínez Cruz*, at para. 155: "in cases of forced disappearances of human beings, circumstantial evidence on which a judicial presumption is based is especially valid." See also, *Gangaram Panday Case*, Inter-Am. Ct.H.R., Judgment of January 21, 1994, Series C, No. 16 (hereinafter, "*Gangaram Panday*"), at para. 49; *Blake*, at paras. 47 and 49; *Paniagua Morales*, at para. 72; *Castillo Páez*, at para. 39; *Loayza Tamayo Case*, at para. 42.

³⁶*Castillo Páez*, at para. 39: "the criteria used in evaluating the evidence before a human rights tribunal possess special characteristics, since the determination of a State's international responsibility for violation of the rights of a human person bestows greater latitude in the evaluation of the testimony it has heard on the pertinent facts, in accordance with the rules of logic and on the basis of experience (citation to *Loayza Tamayo*)."

V. Disappearances and the Right to Life

The documented history of disappearances in Latin America and in other parts of the world has repeatedly demonstrated that this is a crime which most often leads to the death of the victim. In the overwhelming majority of cases, victims of forced disappearances die while in detention. In fact, "they are victims of a secret violation of the right to life."³⁷ International bodies have also noted the fatal nature of the crime; for instance, the Inter-American Court has pronounced on several occasions that forced disappearances frequently involve the violation of the right to life.³⁸ The United Nations has issued similar language, stating in the Declaration on the Protection of All Persons from Enforced Disappearances that forced disappearances violate or constitute a grave threat to the right to life.³⁹

³⁷Nigel S. Rodley, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, 2nd ed., Oxford, 1999 (hereinafter, "Rodley"), at 246. See also, "DISAPPEARANCES" AND POLITICAL KILLINGS: HUMAN RIGHTS CRISES OF THE 1990S, A MANUAL FOR ACTION, Amnesty International, Amsterdam, 1994, at 85: "... often the 'disappeared' are never seen again alive. As time passes the fear will grow that a 'disappeared' person has been killed. ... [The victims] must face the prospect of being killed, and indeed this is often how their life ends." See also, Juan E. Méndez et. al., "Disappearances and the Inter-American Court: Reflections on a Litigation Experience," 13 *Hamline L.Rev.* 507, at 511: "For the most part, [the policy of disappearances] includes the decision to eliminate the victim as soon as he or she ceases to provide any intelligence, and to dispose of the corpse in a way to ensure the continued 'deniability' of the process."

³⁸"[the] practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life...." *Velásquez Rodríguez*, at para. 157; *Godínez Cruz*, at para. 165. See also, *Blake*, at para. 66, stating that forced or involuntary disappearances constitute one of the most grave and cruel of human rights violations, which not only causes the

In the inter-American system, a violation of the right to life as a consequence of a forced disappearance can be proven in two different ways. First, it may be established that the facts of the case at hand are consistent with an existing pattern of disappearances in which the victim is killed. Second, the facts of an isolated incident of a fatal forced disappearance can be proven on their own, independent of a context of an official pattern of disappearances. Both methods are used to establish state control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.

Using the first approach involves proving that an officially tolerated or sponsored pattern of forced disappearances that results in the death of the victim existed in the region, and that the victim's disappearance is linked to such practice.⁴⁰ In cases that meet the evidentiary standards on both points, the Inter-American Court will deem the Inter-American Commission's case to be proven.⁴¹

arbitrary deprivation of liberty but also endangers personal integrity, security and the life of the detainee. See also, *Fairén Garbí and Solís Corrales*, at para. 150: "the practice of forced disappearances has often implied the secret execution of prisoners, without a trial, and the hiding of their bodies. That violation of the right to life infringes on Article 4 of the Convention."

³⁹Declaration on the Protection of all Persons from Enforced Disappearances, U.N. Res. 47/133, Article I.

⁴⁰See quote at footnote 27, above.

⁴¹The amount of evidence necessary to establish the existence of a pattern varies from the presentation of documentary and personal evidence, such as expert reports, eye-witness accounts and testimony to the use of press clippings and indirect evidence. An exact standard has not been established for concluding that a pattern of practice exists within a country; the Inter-American Court takes into consideration all of the relevant evidence, defined broadly, as described above. See, e.g., *Castillo Páez*, at para. 42: "On the basis of the documentary and personal evidence, especially the expert report submitted by the Commission, the Court deems it to have been proven that during the period in question, there existed in Peru a practice on the part of the forces of law and order which consisted in the forced disappearance of persons thought to be members of subversive groups, a practice well-publicized by the press." See also, *Velásquez Rodríguez*, at para. 146, discussing the admissibility into evidence of certain press clippings: "many of them contain public and well-known facts which, as such, do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence ... insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras, such as some of those made by the President of the latter. Finally, others are important as a whole insofar as they corroborate testimony regarding the responsibility of the Honduran military and policy for disappearances."

Evidence linking the disappearance of the victim to the practice includes the amount of time that has passed without information regarding the victim. In *Velásquez Rodríguez*, for instance, the Inter-American Court found that the victim's right to life had been violated, given both the circumstances of the disappearance and the fact that seven years had passed without any knowledge of the fate of the victim. These facts, taken together, create "a reasonable presumption that he was killed."⁴² Similarly, in *Godínez Cruz* the Inter-American Court found a violation of the victim's right to life, considering the context of the disappearance and the lack of information six and a half years later about his fate.⁴³

The second approach is to prove the facts of an individual death which resulted from a forced disappearance. One crucial element in demonstrating state responsibility for such a violation is showing that the victim was in the custody of state actors, whether lawfully or unlawfully. For instance, in *Neira Alegria*, it was established that the victims were legally in state custody. Since they were later unaccounted for, the sole fact of having proved state responsibility shifted the burden onto the state to explain the whereabouts of the victims, in accordance with the principles of evidence described in Section IV above. In the view of the Inter-American Court, the government was, or should have been, in control of evidence regarding the victims.⁴⁴

In addition to proving state control, the elapse of time creates a presumption that the victim has died as a result of an isolated incident of forced disappearance, as in proving a case of a pattern of practice. In *Neira Alegria*, the Inter-American Court maintained that, among other things, the fact that eight years had passed without record of the three victims led to the reasonable conclusion that they were killed.⁴⁵ Additionally, in *Castillo Páez* the Inter-American Court considered the amount of time that had elapsed since the victim had disappeared (seven years), and concluded that indeed there had been a violation of the right to life.⁴⁶ In that case, the Inter-American Court reaffirmed that "the disappearance of persons violates several rights established in the Convention including the

⁴²*Velásquez Rodríguez*, at para. 188.

⁴³*Godínez Cruz*, at para. 198.

⁴⁴*Neira Alegria*, at para. 65; *Paniagua Morales*, at paras. 3-7.

⁴⁵*Neira Alegria*, at para. 76.

⁴⁶*Castillo Páez*, at para. 70-71: "The Court deems to have been proven the violation of Article 4 of the Convention which protects the right to life, inasmuch as Mr. Castillo Páez was arbitrarily detained by agents of the Peruvian police force, that the detention was denied by the authorities who, on the contrary, hid him so that he would not be located, and his whereabouts have been unknown since that time, so that it may be concluded that the victim was deprived of his life, given the time that has elapsed since October 21, 1990."

right to life, when, as in this case, several years have passed without knowledge of the victims whereabouts (citations to *Neira Alegria*, *Caballero Delgado*, and *Blake*).⁴⁷

Along these lines, the Inter-American Court in *Castillo Páez* dismissed the state's line of reasoning that a violation to the right to life cannot be concluded without additional evidence, namely, the body of the victim.⁴⁸ Having established the abduction by the police, the Inter-American Court rejected the argument that a body should be required as evidence of the violation of the right to life, because typically the perpetrators of forced disappearances destroy all trace of the crime, including the corpse. It stated:

⁴⁷*Id.*, at para. 72.

⁴⁸*Id.*, at para. 71.

"The State's argument that the fact that there is no knowledge of a person's whereabouts does not mean that he has been deprived of his life, since 'the body in the crime [...] would be missing,' which it claims to be a requirement of contemporary criminal doctrine, is inadmissible. This reasoning is unsound since it would suffice for the perpetrators of a forced disappearance to hide or destroy a victim's body, which is frequent in such cases, for there to be total impunity for the criminals, who in these situations attempt to erase all traces of the disappearance."⁴⁹

These cases demonstrate the Inter-American Court's willingness to find a violation of the right to life of a forced disappearance victim on the sole basis of proven state custody, without further evidence. Given the scarcity of direct evidence in cases where the body of the victim is not found, the Inter-American Court will consider proof that the victim was in state custody to be sufficient to shift the burden to the state, which is in control of the evidence, and which must then prove that the detainee has not been killed. Relevant evidentiary standards do not require production of additional evidence such as the confession of a perpetrator, eye-witness testimony, a corpse, or blood in order to establish the violation of the right to life.

Moreover, it is incumbent upon the accused state to produce any information it has regarding the victim. In the inter-American system, there is a recognized duty of the state to investigate human rights violations,⁵⁰ which continues as long as information about the fate of the victim is lacking.⁵¹ Conducting an investigation into cases of forced disappearances deters repetition of the crime and strengthens judicial due process, while failure to do so constitutes a blatant disregard by the state of the rights that have been violated and compounds the crime.⁵² In fact, the lack of investigation of the crime implies a violation of the guarantee of the right to life.⁵³

⁴⁹*Id.*, at para. 73.

⁵⁰*Velásquez Rodríguez*, at para. 174: "The State has the duty ... to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." See also, *Godínez Cruz*, at para. 184; *Castillo Páez*, at para. 90. See also, the U.N. Declaration on the Protection of All Persons from Enforced Disappearances (U.N. Res. 47/133), Article 13, which calls on governments to ensure effective investigations into cases of forced disappearances.

⁵¹*Velásquez Rodríguez*, at para. 181; *Godínez Cruz*, at para. 191.

⁵²See, TEN YEARS OF ACTIVITIES, at 319-320: "[Disappearances are] a demonstration of the government's inability to maintain public order and state security by legally authorized means and of its defiant attitude towards national and international agencies engaged in the protection of human rights. ... [The] lack of an immediate acknowledgment of detention may lead to the disappearance of a person or to the practice of other abuses which endanger the life or physical integrity of the person detained."

⁵³*Velásquez Rodríguez*, at para. 188.

VI. Disappearances and the Prohibition Against Torture

Both inter-American and other international legal instruments recognize the strong correlation between acts of forced disappearance on one hand and torture and cruel and inhuman treatment on the other. Several Articles of the American Declaration of the Rights and Duties of Man call for the protection of the right to personal integrity, which encompasses the prohibition of torture and cruel and inhuman treatment: Article I, Article XXV and Article XXVI.⁵⁴ The American Convention contains similar provisions in Article 5 regarding the right to humane treatment.⁵⁵ The United Nations Declaration on the Protection of All Persons from Enforced Disappearances refers to the connection between forced disappearances and torture in Article I, which states that "Any act of enforced disappearance... constitutes a violation of ... the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment."⁵⁶

Inter-American jurisprudence is consistent with such legal instruments and has found state responsibility for torture in cases of forced disappearances. In *Velásquez Rodríguez* and *Godínez Cruz*, the Inter-American Court found convincing the fact that the Honduran government had subjected other detainees to cruelty and torture, as well as the history of disappearances in that country, in order to conclude that these victims had also been tortured. It is of sufficient probative value that incidents of forced disappearances tend to involve acts of torture. The Inter-American Court stated:

"investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman

⁵⁴American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States in Bogotá, Colombia, 1948. Article I reads: "Every human being has the right to life, liberty and the security of his person." Article XXV includes in part: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. ... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody." Article XVII states in part: "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

⁵⁵Article 5 of the American Convention states: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

⁵⁶Article I, United Nations Declaration on the Protection of all Persons from Enforced Disappearances, (U.N. Res. 47/133).

and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the [American] Convention.⁵⁷

In addition to finding torture, the Inter-American Court has determined that forced disappearance or *incommunicado* detention of the victim at the hands of the state in itself constitutes proof of cruel and inhuman treatment. It elaborated its view in *Velásquez Rodríguez* and *Godínez Cruz*, where it stated that:

⁵⁷*Velásquez Rodríguez*, at para. 156; *Godínez Cruz*, at para. 164.

"the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity."⁵⁸

The Inter-American Court presumes that a person held at the mercy of state agents who deny the detention will suffer anguish which amounts to cruel and inhuman treatment. This line of reasoning has been followed by the Inter-American Court in recent cases of isolated incidents of *incommunicado* detention, even in a detention admitted by state authorities. The Inter-American Court stated:

"One of the reasons that *incommunicado* detention is considered to be an exceptional instrument is the grave effect that it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position and increases the risk of aggression and arbitrary acts in prisons."⁵⁹

Notably, the Inter-American Court has also concluded that the right to life and to humane treatment are threatened in the absence of protection of *habeas corpus*, implicit in a disappearance case. It stated in an advisory opinion that:

"Habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended."⁶⁰

Finally, the Inter-American Court has found that forced disappearances affect not only the person abducted but also his or her family. The disappeared person is first victimized. Then, the victim's family is left in a state of helplessness because of the complete absence of knowledge of the fate of the victim, which in turn generates further suffering. This is compounded by the denial of *habeas corpus* petitions which may be filed by family members on behalf of the victim. Such distress has been characterized by the Inter-American Court as a violation of family members' rights against cruel and inhuman treatment.⁶¹

⁵⁸*Velásquez Rodríguez*, at para. 187; *Godínez Cruz*, at para. 197.

⁵⁹*Suárez Rosero*, at para. 90.

⁶⁰Inter-Am. Ct.H.R., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8. See also, *Castillo Páez*, at para. 83.

⁶¹*Blake*, at para. 114.

VII. Conclusion

In sum, given the drastic nature of the crime of forced disappearances and the scarcity of direct evidence in most cases, the Inter-American Court will consider both direct and indirect evidence to inductively conclude that the victim of a forced disappearance has been killed or tortured.⁶² Moreover, taking into account the concerted efforts of the perpetrators to erase any traces of the crime, the Inter-American Court has shifted the burden of proof in certain circumstances in order not to legitimize impunity for those states which have perfected the technique of forced disappearances, leaving no witnesses or evidence of their crime.

CEJIL would ask that the Court consider the ramifications of finding no violation to the right to life or the right to humane treatment for the victim of a forced disappearance. The international community has made clear that the practice of forced disappearances constitutes a crime against humanity and mocks the rule of law.⁶³ Should the perpetrators of such crimes find that, by the very nature of the crime, it is impossible to prove their responsibility for the fate of the victim, then the crimes will continue and the recommendations of the General Assemblies of the Organization of American States and the United Nations that forced disappearances be investigated and stopped, will come to naught.

In the words of Ernesto Sábato:

"They [the victims] were brutally snatched, no longer existing in the eyes of the law. Who exactly had taken them? Where were they? There were no precise answers to these anguished pleas: the authorities had never heard of them, prison cells had never housed them, the justice system disowned them. An ominous silence surrounded them. No kidnappers, no place of captivity, no punishment for the guilty. Days, weeks, months, years of uncertainty and anguish passed..."⁶⁴

⁶²Castillo Páez, at para. 39.

⁶³The practice of forced or involuntary disappearances has been characterized by the General Assembly of the Organization of American States as a crime against humanity, weakening those norms that guarantee protection against arbitrary detention and the right to personal safety and security. (AG/RES. 666 (XIII-0/83) (OAS General Assembly Resolution adopted on Nov. 18, 1983); AG/RES. 742 (XIV-0/84) (OAS General Assembly Resolution adopted on Nov. 17, 1984); AG/RES. 950 (XVIII-0/88) (OAS General Assembly Resolution adopted on Nov. 19, 1988); AG/RES. 1022 (XIX-0/89) (OAS General Assembly Resolution adopted on Nov. 18, 1989); AG/RES. 1044 (XX-0/90) (OAS General Assembly Resolution adopted on June 8, 1990).) See also, Rome Statute of the International Criminal Court, July 17, 1998, Article 7; Rodley, at 267-69; and U.N. Res. 47/133.

⁶⁴LA DESAPARICIÓN FORZADA CRIMEN CONTRA LA HUMANIDAD, APDH, Buenos Aires, 1987, at 19, prologue by Ernesto Sábato, who headed the Argentine National Commission on the Disappearances of Persons (unofficial translation).